88-860

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1988

LUMBEE FARMS COOPERATIVE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether an employer has any legal duty or obligation under the National Labor Relations Act to deal with an uncertified and unrecognized union representative who purports to make an offer to return to work for nonunionized, striking employees.

RULE 28.1 LISTING

There are no parent companies, subsidiaries, or affiliates to list for Lumbee Farms Cooperative, Inc.

TABLE OF CONTENTS

	Page
Table of Authorities	i
Opinions Below	2
Jurisdiction	2
Statutory Provisions Involved. . . .	3
Statement of the Case.	4
Argument	
1. Introduction	18
2. The Decisions Below in the Present Case. . . .	20
3. Reasons Why Writ Should Issue.	24
Conclusion	34
Appendix	
A. Opinion of U. S. Court of Appeals for the Fourth Circuit.	A-1
B. Decision and Order of the National Labor Relations Board.	A-15
C. Decision of the Administrative Law Judge	A-46
D. Order Denying Petition for Rehearing.	A-158
E. Text of Statutory Provisions	A-160

TABLE OF AUTHORITIES

Cases	Page
F. M. Homes, Inc., 235 N.L.R.B. 648, 98 L.R.R.M. 1078 (1978) . .	30
The Grand Union Company, 123 N.L.R.B. 1665, 44 L.R.R.M. 1201 (1959).	30
Hendon & Co., Inc., 197 N.L.R.B. 813, 80 L.R.R.M. 1806 (1972) . .	30
J. I. Case Co. v. NLRB, 321 U.S. 332 (1974)	27
Linden Lumber v. NLRB, 419 U.S. 301 (1974)	20, 27
Marlene Industries, 255 N.L.R.B. 1446, 107 L.R.R.M. 1346 (1981) .	30
Materials Research Corp., 262 N.L.R.B. 1010, 110 L.R.R.M. 1410 (1982).	26
NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959)	28
NLRB v. Jones & Laughlin, 301 U.S. 1 (1937)	27
Sears, Roebuck & Co., 274 N.L.R.B. 230, 118 L.R.R.M. 1329 (1985) . .	21, 26, 27

Page

Statutes

29 U.S.C. § 152(5) 28

29 U.S.C. § 157. 19

29 U.S.C. § 158(a) 18

29 U.S.C. § 159. . . . . 18, 19

Other Authorities

Section 17 of the Restatement of Agency 2d. 33

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Lumbee Farms Cooperative, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case entered on June 28, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is printed in the separate Appendix as Appendix A (p. A-1). The Decision and Order of the National Labor Relations Board is reported at 285 N.L.R.B. 51 (1987) and is printed in the separate Appendix as Appendix B (p. A-15). The Decision of the Administrative Law Judge for the Division of Judges of the National Labor Relations Board is incorporated in the Decision and Order of the National Labor Relations Board and is printed in the separate Appendix as Appendix C. (p. A-46).

JURISDICTION

The Judgment of the Court of Appeals was entered on June 28, 1988. On July 28, 1988, an Order was filed in the

Court of Appeals denying a petition for rehearing and suggestion for rehearing en banc that had been timely submitted to the Court of Appeals by this Petitioner. That Order is reprinted in the separate Appendix as Appendix D. (p. A-58) This Court has jurisdiction to review the Judgment of the Court of Appeals by certiorari, pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are set out in Appendix E beginning at page A-160 of the separately bound Appendix:

29 U.S.C. § 152(5);

29 U.S.C. § 157;

29 U.S.C. § 158(a);

29 U.S.C. § 159.

STATEMENT OF THE CASE

This case originated when the Industrial Union Department, AFL-CIO (hereinafter "the IUD") filed two unfair labor practice charges against Lumbee Farms Cooperative, Inc. (hereinafter "Employer"). The unfair labor practice charge in Case No. 11-CA-11773 was filed on September 4, 1985, and amended on September 11, 1985, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (hereinafter "the Act"). 29 U.S.C. § 158(a)(1) and (3). The charge was subsequently amended on October 21, 1985, and the Section 8(a)(3) allegation was withdrawn. The charge, as amended, alleged that Employer had violated Section 8(a)(1) of the Act by terminating three named employees on

August 26, 1985, and by refusing to reinstate other employees subsequent to a strike at Employer's facility.

The charge in Case No. 11-CA-11841 was filed by the IUD on November 13, 1985, and amended December 23, 1985, alleging that Employer had discriminated against two named employees in violation of Section 8(a)(1) of the Act. The Complaint in Case No. 11-CA-11773 was issued October 18, 1985, and an Order Consolidating Cases, Complaint and Notice of Hearing issued December 30, 1985. Employer filed Answers to the Complaints on October 24, 1985, and January 9, 1986, denying the commission of the alleged unfair labor practices. In the proceedings before the Administrative Law Judge and the National Labor Relations Board,

Employer was the "Respondent" and the IUD was the "Charging Party."

Commencing on February 10, 1986, and continuing through February 12, 1986, a hearing was conducted in Lumberton, North Carolina, before Administrative Law Judge Hutton S. Brandon. On May 27, 1986, Judge Brandon issued his Decision, to which Employer filed Exceptions with the National Labor Relations Board on June 18, 1986, along with a Brief in Support of Exceptions.

On August 31, 1987, the Board, with Chairman Dotson dissenting, issued its Decision and Order affirming the Administrative Law Judge's rulings, findings, and conclusions.

On October 19, 1987, Employer filed a petition for review in the United States Court of Appeals for the Fourth

Circuit pursuant to Sections 10(e) and (f) of the Act (29 U.S.C. § 160), which grant jurisdiction to the Court of Appeals in such matters. Employer ("Petitioner" in the Court of Appeals) requested that the Court of Appeals set aside the Order of the Board entered August 31, 1987. On November 3, 1987, the Board ("Respondent" in the Court of Appeals) filed a cross-application with the Court of Appeals for enforcement of the Order entered August 31, 1987. The Court of Appeals in an unpublished per curiam opinion denied Employer's petition for review and granted enforcement to the Decision and Order of the Board entered August 31, 1987. Employer filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, but the Court of Appeals denied that petition in an

Order filed July 28, 1988. Employer then filed a timely Motion for Stay of the Mandate pending application to the United States Supreme Court for a writ of certiorari. The Court of Appeals denied that motion in an Order filed August 4, 1988.

Employer now petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals, which granted enforcement to the Order of the Board.

THE FACTS

Employer is the operator of a poultry processing plant located in Lumber Bridge, North Carolina. It is primarily in the business of supplying processed chicken to the fast-food industry.

On Monday, August 19, 1985, and Thursday, August 22, 1985, several Lumbee

Farms employees and two nonemployees met to discuss certain job-related issues. At these meetings, they decided to strike or walk out on Monday, August 26, 1985, or Tuesday, August 27, 1985. Tuesday was ultimately chosen instead of Monday because it would be the "biggest" day for processing chickens at the plant. The employees decided to walk out for better working conditions, more benefits and to force Employer to give them a wage increase. After the Thursday meeting, the employees contacted other employees about walking out.

Sometime between 3:00 and 4:00 p.m. on Monday, August 26, 1985, Mr. Franklin Watts, Employer's Processing Manager, notified Mr. Walter Geiger, General Manager, that an employee named Isiah Jackson had reported that there was talk

in the plant about a walkout taking place the next morning. Mr. Geiger requested that Mr. Watts bring Mr. Jackson to his (Mr. Geiger's) office. Mr. Jackson told Mr. Geiger that he had been approached by Patsy Clark, Diane Williams, Jeannette Townsend and Gwendolyn Smith about joining a walkout planned for the next morning to protest the fact that Lumbee Farms allegedly was hiring too many Koreans. Mr. Jackson then repeated this assertion in the presence of three supervisors.

In response to Mr. Jackson's statements, Mr. Geiger directed Mr. Watts to terminate the employment of the four named employees for encouraging a walkout to protest the alleged hiring of too many foreign nationals. Mr. Geiger instructed Mr. Watts to use Plant Policy

D-16, which prohibits the restriction of output and the intimidation of others in order to restrict output. Mr. Watts told the employees they were being discharged and read Policy D-16 to them, but said nothing else. Gwendolyn Smith later denied having violated Employer's rules and asked to talk to Mr. Geiger. Pursuant to Mr. Geiger's follow-up investigation, she was reinstated and compensated for the wages she had lost.

The next morning, Tuesday, August 27, 1985, at approximately 7:57 a.m., Mr. Geiger was notified by his Quality Assurance Manager that the employees were walking off the eviscerating line. At the time the employees walked out, there were partially processed chickens throughout the processing system. After the employees had walked out into the

parking lot, Mr. Geiger and Mr. Watts went to where they were gathered. Mr. Geiger told the striking employees that they had walked out and left chickens on the processing lines and that if they did not return to work within five (5) minutes, he would replace them. No employee made any comment or statement to Mr. Geiger or Mr. Watts. At no time before, during or after the walkout did any employee involved in the walkout communicate in any way to any member of management at Lumbee Farms the employees' grievances, the reason or reasons for the walkout or any demands that were being made on management with respect to the walkout.

Prior to the walkout, the management of Lumbee Farms had had no contact with Mr. Mike Black, Coordinator, Industrial

Union Department, AFL-CIO, nor with his organization. Before the walkout, only two groups had purported to represent the interests of some Lumbee Farms employees: the Lumbee Farms Employees Concerns Council and the Robeson County Clergy and Laity Concerned ("CALC"). On August 27, 1985, after the walkout had begun, Mr. Geiger was informed by Reverend Mac Legerton, the head of CALC, that his organization had discontinued contact with Lumbee Farms employees but that two of CALC's former employees, Thomas Jones and Johnny Jacobs, were assisting the Lumbee Farms Employees Concerns Council at the time of the walkout. Employees who walked out had not had any contact with Mr. Black or the Industrial Union Department, AFL-CIO, prior to the walkout.

On Thursday, August 29, 1985, Mr. Black spoke to some of the employees at the situs of the picketing. Mr. Black discussed making an unconditional offer for them to return to work and accused Employer of committing unfair labor practices. Some of the employees who were present indicated their agreement that Mr. Black send a telegram offering for them to return to work. Other employees who had walked out were not aware of Mr. Black's statements or did not agree for him to act on their behalf regarding an offer to return to work. No record was made of those present when Mr. Black spoke or of those who indicated their agreement to have a telegram sent to Mr. Geiger. No employee informed Lumbee Farms management that Mr. Black was going to send a telegram on behalf of

any striking employee or that he had done so.

The contents of Mr. Black's mailgram, dated 10:12 a.m. E.S.T., August 29, 1985, were telephoned to Mr. Geiger that same day. The mailgram stated that Mr. Black had been designated as spokesman for the "striking" employees, asserted that the employees were engaged in an unfair labor practice strike and unconditionally offered for them to return to work. By his own mailgram of 1:17 p.m., August 29, 1985, Mr. Geiger informed Mr. Black that all of the employees who had engaged in the walkout had been permanently replaced. By letter of August 30, 1985, Mr. Geiger placed Mr. Black on notice that he considered the offer for the employees to return to work to be invalid because Lumbee Farms had no reason to

believe that Mr. Black was authorized to make the offer. In particular, Mr. Geiger's letter to Mr. Black stated, "your organization is neither certified by the National Labor Relations Board nor recognized by this company as the representative of any group of employees associated with this facility." Mr. Black did not respond to Mr. Geiger's letter and did not inform employees who had walked out that Mr. Geiger considered the offer to return to work to be invalid.

On Friday morning, August 30, 1985, some of the employees who had engaged in the walkout gathered outside the plant. Employee Vivian Godwin and two passengers in her car attempted to enter the plant property but were turned away by a plant security guard. On that morning,

employees engaged in the walkout made no requests or attempts to speak with Mr. Geiger or other members of management about returning to work.

On or about the second week of September 1985, Employer sent to those employees who had left their jobs on August 27, 1985, a Notice to Employees Who Engaged in the Walkout. The Notice invited the employees to make unconditional offers to return to work by completing and submitting the attached "Hiring List Application." Some employees returned completed forms, evidencing their unconditional offers to return to work. Some employees did not return the form; one who testified said she figured that if Lumbee Farms needed her, they would call.

ARGUMENT

1. Introduction.

This case raises a representational issue of far-reaching importance in delineating the relationship between management and labor under the National Labor Relations Act. At the heart of that relationship and of the Act itself is the Section 9 mechanism for a majority of employees in an appropriate bargaining unit to determine in a secret ballot election whether or not they wish to be represented by a union and the Section 8(a)(5) duty of an employer to bargain in good faith with the duly elected and certified representative of its employees. 29 U.S.C. §§ 158(a)(5) and 159. However, just as employees pursuant to Section 7 of the Act may refrain from choosing union or other collective

representation, an employer has no general statutory duty or obligation to deal with, bargain with or recognize any alleged representative of its employees that has not been elected and certified pursuant to the administrative processes of Section 9 of the Act. 29 U.S.C. §§ 157 and 159. In the decisions below, neither the Board nor the Court of Appeals adequately addressed this question. As a result, the case, as it presently has been decided, stands for a proposition that is contrary to the legislatively mandated representational scheme outlined above. In this respect, the decisions below are also in conflict with precedents of this Court and with Board precedent.

2. The Decisions Below in the Present Case.

Employer has contended from the very beginning that Mr. Black's August 29 mailgram was an invalid offer to return to work. Employer immediately took that position in Mr. Geiger's letter of August 30, in response to Mr. Black's mailgram. Employer reasserted that position at every stage of the proceedings below.

In his Decision and Order, the Administrative Law Judge rejected Employer's legal argument on this issue and held that Mr. Black's "offer on behalf of the strikers was valid." In order to reach that result, the Administrative Law Judge had to find that the following cases relied upon by Employer were "inapposite": Linden Lumber v. NLRB, 419 U.S. 301, (1974) and Sears,

Roebuck & Co., 274 N.L.R.B. 230, 118 L.R.R.M. 1329 (1985).

The three-member panel of the Board that considered Employer's exceptions to the Administrative Law Judge's Decision did not directly address the representational issue presented here even though that issue was thoroughly briefed for the Board. The Board's failure to address this most important issue is explained by the nature of the majority and dissenting opinions written by the panel members. The majority opinion is obviously "dissent-driven" and discusses no issue that is not specifically raised by the dissent. The dissenting opinion, powerfully authored by Chairman Dotson, did not reach the representational issue because Chairman Dotson would have dismissed the Complaints in their

entirety on other grounds. Thus, neither the majority nor the dissent addressed a single line to the representational issue.

In the Court of Appeals, Employer again asserted its argument that the offer by Mr. Black for some employees to return to work was invalid and Employer thoroughly briefed and argued that issue. General Counsel for the Board counter argued that "Black acted with both actual and apparent authority in sending the offer by mailgram." In its decision, the Court of Appeals devoted only one sentence to the representational issue: "We find no merit to Lumbee's contention that the IUD representative was not an appropriate agent to relay the employees' unconditional offer to return to work because his union was not their elected

representative." That statement clearly indicates that the Court of Appeals failed to understand the substance and the import of Employer's argument on this issue.

Because neither the Board nor the Court of Appeals thoroughly reviewed the erroneous decision of the Administrative Law Judge on this point, the case presently holds that an employer cannot demand to continue to deal directly with its own employees when confronted by a communication interposed by an uncertified and unrecognized union representative. This result is clearly contrary to the legislatively mandated representational scheme established in the National Labor Relations Act and contrary to Supreme Court and Board precedent.

3. Reasons Why Writ Should Issue.

Because this case presently stands for a proposition that is contrary to the legislatively mandated representational scheme established in the National Labor Relations Act and contrary to Supreme Court and Board precedent, this Court should grant this Petition for Writ of Certiorari. This case presents a very important question of federal statutory law and should be reviewed by this Court.

With respect to the alleged offer made by Mr. Black on August 29, 1985, the legal sufficiency of any such attempted delegation of authority by the strikers and of the "offer" itself depends not on common law principles of agency but on the scope of those statutorily mandated representational rights encompassed by the National Labor Relations Act. Within

that context, neither Mr. Black nor the Industrial Union Department, AFL-CIO, was certified or recognized as the representative of the employees; therefore, neither possessed the legal authority to make an offer for the employees to return to work, and Employer had no legal obligation to accept their "offer" as valid or legally enforceable. In fact, to require Employer to have accepted that "offer" as valid would require an employer in a nonunionized setting to recognize and deal with the equivalent of a union representative in a manner that would be contrary to the Act's concept of representation.

The representational scheme established by the Act gives to Employer, and to other similarly situated nonunionized employers, the right to refuse to deal

with or bargain with uncertified and/or unrecognized union representatives. This principle was reaffirmed in 1985 by the National Labor Relations Board in Sears, Roebuck & Co., 274 N.L.R.B. 230, 118 L.R.R.M. 1329 (1985). In Sears, an employee requested to be represented in a disciplinary matter by the union that was engaged in efforts to organize the employer's employees. The Board, in rejecting and reversing the rationale of the Board's earlier three-member majority in Materials Research Corp., 262 N.L.R.B. 1010, 110 L.R.R.M. 1410 (1982), restricted the application of Weingarten rights to a unionized setting. In its decision, the Board stated:

> [W]hen no union is present, an employer is entirely free to deal with its employees on an individual, group, or wholesale basis. . . . Importantly, the freedom to deal individually

> spans all terms and conditions of employment . . . .

Sears, supra, 118 L.R.R.M. at 1330 (emphasis added).

The right to deal with employees in a nonunionized setting on an individual basis was established by earlier decisions of this Court. Linden Lumber v. NLRB, 419 U.S. 301 (1974); J. I. Case Co. v. NLRB, 321 U.S. 332 (1944); and NLRB v. Jones & Laughlin, 301 U.S. 1 (1937). In reaffirming this basic principle, the Board concluded in Sears that the involvement of a union in even limited circumstances that concern the employer's relationship with its employees would constitute "dealing with" the employer, and that "dealing with" an employer "is a primary indicium of labor organization status as well as a traditional union function." 118 L.R.R.M. at

1331. Employer asserts that the same principles that were recognized by the Board in Sears are applicable in the instant matter, and those principles establish Employer's right to have refused to deal with Mr. Black or the Industrial Union Department and justify Employer having treated the "offer" of August 29, 1985, either by itself or in concert with any other act, as an invalid offer for the employees to return to work.

The term "dealing with" discussed above clearly includes union involvement that falls short of bargaining. The term is in fact a term of art that appears at Section 2(5) of the Act. It was defined by this Court in NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959). In that decision, this Court held that "dealing

with" is not synonymous with the term "bargaining with" but instead contemplates an even more fluid and less restrictive relationship short of collective bargaining. Employer asserts that for it to have accepted the validity of the "offer" made by Mr. Black and the Industrial Union Department would have constituted "dealing with" that organization, an action Employer was legally privileged to avoid pursuant to Sears, supra. Additionally, even if Mr. Black had acted alone, and not as a representative of the Industrial Union Department, the same principle would apply, because it has been established that an individual who attempts to "deal with" an employer can be a labor organization where the individual is designated by a group of employees to represent them.

The Grand Union Company, 123 N.L.R.B. 1665, 44 L.R.R.M. 1201 (1959).

As noted above, the Administrative Law Judge found "the Sears and Linden Lumber cases inapposite." He concluded that the question of the legal sufficiency of the Industrial Union Department's telegram of August 29, 1985, is controlled by the Board's decision in F. M. Homes, Inc., 235 N.L.R.B. 648, 98 L.R.R.M. 1078 (1978), cases cited at footnote 4 of that decision, and Hendon & Co., Inc., 197 N.L.R.B. 813, 80 L.R.R.M. 1806 (1972). Additionally, he referred to Marlene Industries, 255 N.L.R.B. 1446, 107 L.R.R.M. 1346 (1981). Although Employer contends that these cases are clearly distinguishable from the present situation, if they are deemed to apply, then they create a conflict between

themselves and the Supreme Court and Board precedent upon which Employer relies.

Before the Court of Appeals, General Counsel asserted that "[t]he record provides ample evidence that Black acted with both actual and apparent authority in sending the offer by mailgram." However, by making this argument, General Counsel ignored the statutory authority and representational scheme of the Act it seeks to enforce and the agency it represents. Principles of agency are simply not applicable to proceedings under the National Labor Relations Act. General Counsel failed to cite any decisions of the National Labor Relations Board or of federal courts interpreting the National Labor Relations Act that have recognized the applicability of the

concepts of "actual" or "apparent" authority that General Counsel promoted. General Counsel failed to do so because, in the 53-year history of the National Labor Relations Act, there have been no such decisions.

Since Mr. Black's "actual and apparent authority" cannot be found under the representational provisions of the National Labor Relations Act, if such authority exists, it must be grounded instead in common law agency principles. However, the elaborate statutory structure governing the relationship between management and labor under the Act would be undercut by the incorporation of such contravening concepts. In this regard, the Restatement of Agency 2d expressly recognizes that public policy is an exception to the application of common

law agency principles. Section 17 of the Restatement of Agency 2d states:

> A person privileged, or subject to a duty to perform an act or accomplish a result can properly appoint an agent to perform the act or accomplish the result, unless public policy, or the agreement with another requires personal performance; if personal performance is required, the doing of the act by another on his behalf does not constitute the performance by him. [Emphasis added.]

The Court of Appeals' determination that the strikers could delegate the giving of notice of their unconditional offer to return to work to Mr. Black and that he would then have "actual or apparent authority" to give such notice to the Company, does great damage to the statutory structure for deciding representational issues that is set forth in the National Labor Relations Act. Public policy requires that any alleged

attempt to appoint Mr. Black to act as agent for the strikers not be recognized and that the attempted notice to the Company by Mr. Black not be construed as notice to the Company by the strikers.

Thus, the Court of Appeals erroneously determined that there was no merit to Lumbee's contention that Mr. Black's offer was invalid because his union was not the elected representative of Lumbee employees. Employer's position on this important point of law is in harmony with the National Labor Relations Act, precedent of this Court, and Board precedent. More merit than that, it need not have.

CONCLUSION

For the reasons set forth above, Employer urges the Court to grant this Petition for Writ of Certiorari.

Respectfully submitted this 26th day of October, 1988.

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